Supreme Court, U.S.
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No. 99-732

IN THE

Supreme Court of the United States

DAVID WEBER,

Petitioner,

v.

STRIPPIT, INC., IDEX CORPORATION, JAMES BLACKSTONE, ROD J. SIMEONE, and THOMAS G. HOAG,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The Petitioner fails to include Rod J. Simeone and Thomas J. Hoag who were parties to the proceeding.

At the time of the trial, IDEX Corp. was the parent of Strippit, Inc. As of August 25, 1998, Strippit, Inc. was no longer a subsidiary of IDEX Corp. as a result of its having been purchased by its present parent corporation, LVD Company n.v. of Gullegem, Belgium.

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STATEMENT OF THE CASE

Strippit, Inc. ("Strippit") is headquartered in Akron, New York and up until August 25, 1998 had been a unit or subsidiary of IDEX Corporation, ("IDEX") which is purely a holding company located in Illinois. On August 25, 1998, LVD Company n.v. of Gullegem, Belgium became the owner of Strippit.

The Petitioner, who was 50 at the time, was hired by Strippit in May of 1990 as an International Sales Manager assigned to Asian markets as well as other parts of the world. At the time of his hire, Petitioner was allowed to remain in Minneapolis, Minnesota during the initial phase of his employment in response to his request for accommodation based on personal family matters. At no time was it ever contemplated that the Petitioner would permanently remain in Minnesota while holding the position of international sales manager since it had been an established practice and policy of Strippit uniformly applied that international sales managers were to be located either in their sales territory or at Strippit headquarters.

In 1992, Strippit management began a series of discussions with Petitioner regarding its requirement that he relocate to corporate headquarters in Akron, New York based on its belief and judgment that Petitioner would be able to perform his job more efficiently and effectively improve his technical knowledge of Strippit's products by such relocation. Before the issue could be resolved, Petitioner suffered a heart attack in 1993 which precluded his relocation for a period of time and Strippit accommodated him during his period of convalescence. Petitioner did fully recover from his heart attack and was authorized by his physician to return to work without any medical restrictions.

Thereafter, Strippit gave the Petitioner the option of relocating to Akron, New York and continuing in his position of international sales manager, or in the alternative, accepting the position of a domestic sales engineer with a sales territory in Minnesota, Iowa and Wisconsin, thereby allowing him to remain in Minneapolis.

Petitioner rejected the option and refused to relocate to Akron, New York in mid-1994 relying on a recommendation of his doctor that he remain in Minnesota for treatment for an additional six months, after which time his condition would be re-evaluated. However, at no time did Petitioner's physician state that the Petitioner was physically or medically unable to relocate to Akron, New York. Instead, he testified at trial that his recommendation was based on "continuity of treatment" and location of medical records.

Throughout the last several months of his employment, Petitioner continually demanded that his business judgment be substituted for that of Strippit's management by insisting that he be allowed to work out of his home in Minneapolis, Minnesota as the international sales manager rather than relocating to Akron, New York.

On October 24, 1994 Strippit informed Petitioner that he must either relocate to Akron, New York or take the domestic sales engineer position in order to continue his employment with the company and that if he rejected these alternatives, the company would consider him to have abandoned or resigned his employment with it.

Since Petitioner did not respond as of October 31, 1994, Strippit considered him to have voluntarily resigned and distributed the functions of his job as international sales manager to other existing employees in the company.

No decision made by Strippit or any of the Respondents herein as relates to Petitioner was motivated in any way by Petitioner's medical or physical condition or his age.

The position taken by the Petitioner that Strippit or the Respondents were "out to get him" after his heart attack because of his age and alleged disability is completely unsupported by the evidence presented at the trial. After reviewing all of Petitioner's evidence presented at the trial, the District Court Judge correctly dismissed his "actual disability" claim. Thereafter, the Respondents presented their evidence in support of their articulated business reasons for the decisions made with respect to Petitioner's employment. The issues of "perceived disability" and age discrimination were submitted to the jury for resolution. The jury rendered a unanimous verdict in finding that the Respondents did not discriminate against the Petitioner because of a perceived disability or because of his age. The United States Court of Appeals for the Eighth Circuit affirmed the judgment entered in favor of the Respondents. As hereinafter detailed, there is no cause for this Court's review of Petitioner's contentions.

A. THE PETITION MISREPRESENTS WHAT ACTUALLY OCCURRED IN THE PRIOR PROCEEDINGS IN THE WAY THE "QUESTIONS PRESENTED FOR REVIEW" ARE STATED.

In the first question presented, Petitioner fails to advise this Court that the Circuit Court of Appeals ruled that Petitioner had failed on appeal to discuss the issues relating to a *McDonnell-Douglas* jury instruction on burden shifting and mixed motive and therefore was deemed to have waived those claims. (page 20a of Appendix A to the Petition). As a result of the Circuit Court's finding and decision, the issues

presented in Petitioner's first question are not properly before this Court.

In the second question presented, Petitioner misrepresents the medical testimony that was presented at trial. The testimony of Petitioner's expert was merely that Petitioner had suffered a coronary attack from which he had recovered and that he suffered from coronary artery disease. At no time did Petitioner's medical expert ever testify that Petitioner has a "physical or mental condition that substantially impairs a major life function" especially since he could not point out any major life function that Petitioner could not substantially perform including working.

Petitioner also misrepresents the district court's basis for granting judgment to the Respondents pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. The district court, in reviewing Petitioner's evidence found that neither Petitioner nor his physician presented any evidence to establish that Petitioner was substantially limited in any major life activity as a result of his coronary problems. In affirming this judgment, the Circuit Court of Appeals expressly stated that Petitioner's physician "repeatedly failed to identify any particular activity in which Weber was restricted as to condition, manner, or duration as compared to the average person in the general population." (page 11a of Appendix A to the Petition).

The district court did not place undue emphasis on the Petitioner's ability to work in reaching its decision to grant Respondents' Rule 50(a) motion. The district court stated:

> But the issue for purposes of the disability discrimination acts are simply whether he was substantially limited in a *major life activity*. And at this stage, having heard the plaintiff's evidence, the

> Court does not believe that there is a sufficient issue there for the jury. In fact, the jury, in the Court's view, could not find sufficient evidence of a physical impairment that substantially limits *one* or *more* major life activities. (emphasis added) (Trial transcript at p. 1086).

In the third question presented, Petitioner improperly and erroneously characterizes Respondents' use of peremptory challenges as having been "intentionally" based on the ages of the jurors struck and misstates the holding of the Circuit Court of Appeals on this issue. The Circuit Court did not rule "that the intentional exclusion of prospective jurors over age fifty is permissible even in an age discrimination case." What the Circuit Court did say was that it "declined to extend *Batson* to peremptory challenges based on age." The Circuit Court also upheld the district court's findings that the prospective jurors' answers during *voire dire* could support defense counsel's view that the jurors were predisposed to rule against defendants". (page 6a of Appendix A attached to the Petition).

Finally, in the fourth question presented, Petitioner misrepresents the district court's instructions to the jury on the issue of "perceived disability". Instruction 22 given by the district court repeatedly and fairly charged the jury on this issue and it did not "focus" on or, unduly emphasize, "working" as the major life activity to be considered as evidenced by the following:

> Defendants' regarded plaintiff has having a disability if defendants perceived and treated plaintiff as having a physical or mental impairment that substantially or materially limits *one or more* of the major activities of life, such as *caring for oneself, performing manual tasks, walking, seeing, hearing,*

> *speaking, breathing, learning, sitting, standing, lifting, reaching,* or working.
>
> * * *
>
> Plaintiff must prove by a preponderance of the evidence that defendants regarded plaintiff as having a physical impairment that substantially or materially limits *one or more* major life activities and treated him as having such an impairment.
>
> To substantially or materially limit a major life activity means to render an individual unable to perform *a basic function* that the average person in the general population can perform...
>
> * * *
>
> "Working" is *one* of the major life activities you may consider.
>
> (emphasis added) (pages 24a and 25a of Appendix B attached to the Petition).

The Circuit Court of Appeals did not rule that "the focus on working was not error" as alleged by petitioner. It expressly found that the district court had not focused on "working" as a major life activity in its charge to the jury wherein it stated:

> Additionally, the district court did not limit its instruction to the major life activity of working. Rather, the court instructed the jury that it should find Weber disabled if defendants regarded his impairment as substantially limiting *any* major life activity, 'such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, sitting, standing, lifting,

reaching or working'. Thus, 'the instructions taken as a *whole* and viewed in light of the evidence and applicable law, fairly and adequately submitted the issues in the case to the jury'. (citation omitted) (emphasis added) (at page 14a of Appendix A attached to the Petition).

B. PETITIONER MISREPRESENTS AND EXAGGERATES THE FACTUAL HISTORY OF THIS CASE.

Petitioner alleges that he suffered "cardiac arrest" but no evidence establishing such was ever produced at the trial.

Petitioner states that his "condition did not stabilize" and that he continued to experience "substantial problems throughout the remainder of his employment". This allegation is contrary to the testimony given by plaintiff's personal physician at the trial wherein he testified that plaintiff suffered from coronary artery disease but that such condition "wasn't affecting major life functions in such a way that I had to say, Mr. Weber, you can't work." (Trial transcript at pages 549-50).

Petitioner alleges that "Respondents admitted to considering Petitioner's health in making decisions about his employment and continuation thereof" and that Respondents were concerned "that he was not going to be living much longer". These allegations are untrue and are expressly contradicted by the trial testimony of each of the named, individual Respondents wherein they unequivocally testified that at no time did they consider Petitioner's medical condition or age as a factor in making their decisions as to Petitioner's employment. Petitioner not only misrepresents what the actual trial testimony of each of the individual Respondents was, he further compounds the misrepresentation

in the manner in which he sets forth the alleged testimony of Respondent Blackstone in his legal argument in the Petition regarding "perceived disability". Such testimony as set forth has been taken out of context and is piecemealed from the five hundred and eighty-eight (588) pages of pre-trial deposition testimony of Blackstone and not accurately reported. For example, on page 18 of the Petition, Petitioner omits an entire sentence from the answer given by Mr. Blackstone to the first question listed there and inserts the word "health" before the word "lifestyle" in the alleged question. The correct and complete question and answer were in fact as follows:

> Q: So you didn't have any concerns that his heart condition or his lifestyle might cause him to die?
>
> A: I believe that I would consider him not to be a candidate for longevity in perfect health. *But the actual, his actual death or demise, I don't think that was ever a consideration or certainly topic of discussion.* (emphasis added).

What is even more egregious is Petitioner's attempt to mislead this Court by having it appear that the questions and answers set forth on page 18 of the Petition actually were asked and answered in a continuous fashion without any testimony in between when truthfully, that is not the case. Between the first answer and the second question on page 18 of the Petition, the following dialogue took place:

> Q.: Were you concerned as to whether his health conditions would interfere with his ability to perform for Strippit?
>
> A.: I don't think so. I think the concern was that his doctors or doctor would give him the permission or authority to resume his previous business activities.

Q.: Could you explain a little bit more fully for me what you mean by the last part, the concern that his doctors would give him permission to resume his authority? What did you mean by that?

A.: I'm not sure what restrictions his doctor had on him at that point relative to frequency of international travel or relative to his ability to relocate.

Petitioner alleges that the training that he was required to undergo was "useless for his position". This is totally untrue and the reasons and necessity for such training were put into evidence by the Respondents at the trial.

Petitioner alleges that his doctors informed Respondents that he should remain in Minnesota for six months for "medical reasons" and that it was "made clear to Respondents that relocation presented serious health concerns for him". These allegations or misstatements are contradicted by Petitioner's physician who testified at trial that there were no medical restrictions placed on Petitioner in carrying out his employment and that the delay in relocation was more a matter of convenience and for "medical *continuity*." (emphasis added)

Petitioner references "doctors" as having "indicated that Petitioner's case was complicated and needed consistent treatment" and that his "life was endangered by the stress of moving and that stress triples the chances of relapse". It is pointed out that only one doctor, Bruce Johnson, testified on behalf of Petitioner. Dr. Johnson was an internist and not a cardiologist. Petitioner never called the cardiologists who had treated him for his coronary condition. Dr. Johnson unequivocally testified that Petitioner could in fact travel in

1994 and perform his job functions without any limitations. Petitioner did not present any evidence establishing the aforesaid quoted claims.

Petitioner's allegations that he has "permanent daily substantial impacts on many major life activities" was and is not supported by the evidence produced at trial. Petitioner's personal physician repeatedly failed to identify any particular major life activity in which Petitioner was restricted as to condition, manner or duration as compared to the average person in the general population.

Petitioner's allegation that he "is frequently totally disabled requiring hospital intensive care" is totally unsupported by the evidence produced at trial and is a misrepresentation of what was actually established by legally competent evidence produced at the trial.

Petitioner's claim that "Dr. Johnson, when given the legal definition of the ADA, testified that Petitioner does have 'physical or mental impairments' which 'substantially limit' 'one or more major life activities'" belies the fact that upon further examination, Dr. Johnson was unable, and repeatedly failed, to identify any particular major life activity in which Petitioner was restricted as to condition, manner, or duration as compared to the average person in the general population.

Lastly, Petitioner misrepresents what the evidence at trial established as to Petitioner's medical history when he states that he "had numerous, acute episodes of total disability where he was hospitalized in intensive care about a dozen times." The evidence established that on a few occasions, Petitioner went to the hospital emergency room complaining of pain which was determined to be caused by esophageal reflux and not his coronary condition and he was not admitted to the hospital let alone intensive care. Petitioner was also

diagnosed as suffering from "chronic anxiety" arising out of his relationship with his daughter and his wife's medical condition but he was not hospitalized for this condition. The evidence further established that Petitioner had fully recovered from his heart attack suffered in 1993 and that his medical condition thereafter did not substantially limit any major life activity of Petitioner.

REASONS FOR DENYING THE WRIT

A. The *McDonnell-Douglas* Test

The Circuit Court of Appeals expressly found that Petitioner had not properly raised that issue on the appeal to it and therefore Petitioner had waived this claim. As a result of this waiver, this issue is not properly before the Court and need not be considered.

Even if it were determined that a waiver had not occurred, the district court and the Circuit Court of Appeals were correct in holding that an instruction on the *McDonnell-Douglas* test need not be given to the jury. The purpose of the *McDonnell-Douglas* burden shifting analysis is to assist the trial judge to:

> determine whether the litigants have created an issue of fact to be decided by the jury. In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255, n.8 (1981).

The district court properly assessed the burden of production after all of the evidence had been presented by the parties. Notwithstanding that Petitioner had made out a prima

facie case of discrimination, the Respondents did everything that was required of them by offering evidence that articulated and established legitimate business reasons for their actions. By doing so, Respondents met their burden of production as a matter of law and the presumption raised by Petitioner's prima facie case was rebutted and dropped from the case. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1995). The issue of discrimination then became a pure question of fact for the jury to decide based on all of the evidence presented. An instruction on the burden shifting analysis would not have provided anything of substance to aid the jury in carrying out its responsibilities. At this point in the proceedings, the only determination the jury had to make was whether the proffered explanation by the Respondents was pretextual or not and whether the plaintiff had met his burden of proving intentional discrimination by the Respondents.

B. Actual Disability

As previously pointed out in Respondents' Statement of the Case, Petitioner distorts the record of the trial proceedings by selecting bits and pieces of testimony given by Petitioner's physician on direct examination. He fails to set forth the testimony elicited on cross-examination of the doctor wherein and whereby it was clearly and unequivocally established that the doctor repeatedly was unable to identify any particular major life activity in which Petitioner was restricted as to condition, manner, or duration as compared to the average person in the general population. The district court had a full opportunity to review all of Petitioner's evidence in support of his claim and especially the testimony of his physician, which testimony taken as a whole, clearly established that Petitioner, as a matter of law, did not have an actual disability as defined by the ADA. Petitioner's fact bound claim relating to this issue does not warrant review by this Court.

C. Age - *Batson* Challenge

Petitioner attempts to extend the Constitutional protection of the Equal Protection Clause to a classification that does not fall within that clause. It has been repeatedly stated "that age is not a suspect classification under the Equal Protection Clause". *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). Since age does not rise to the level of a constitutional protection, the principle enunciated in *Batson* does not apply to the use of peremptory challenges allegedly based on age. Nevertheless, even if it were assumed *arguendo* that *Batson* did apply, the district court expressly found that defense counsel for the Respondents "had sufficient age-neutral reasons for striking the three jurors". (Page 35a of Appendix B attached to the Petition). "[T]he trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal..." *Hernandez v. New York*, 500 U.S. 352, 364 (1991). Therefore, Petitioner's fact bound claim on this issue does not warrant review by this Court.

D. Perceived Disability

Petitioner's argument on this issue is curious to say the least. He states that his claim of "disability" or "perceived disability" was not based on "working" and therefore, no instruction to the jury on "working" should have been given. However, Petitioner was unable to present any evidence establishing that his impairment of coronary artery disease substantially limited any other major life activity as that term is defined in Section 1630.2(i) of 29 CFR Ch. XIV (7-1-98 Edition). As previously pointed out, Petitioner's medical witness "repeatedly failed to identify any particular activity in which Weber was restricted as to condition, manner, or duration as compared to the average person in the general population". (page 11a of Appendix A attached to the

Petition). Therefore, if "working" was not the major life activity to be considered, Respondents were entitled to judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. Nevertheless, Petitioner once again misapplies the meaning and intent of the regulations set forth under 29 CFR Ch. XIV (7-1-98 Edition).

Section 1630.2(g) of said regulations expressly states:

> The definition of the term 'disability' is divided into three parts. An individual must satisfy at least one of these parts in order to be considered an individual with a disability for purposes of this part. An individual is considered to have a 'disability' if that individual either (1) has a physical or mental impairment which substantially limits one or more of that person's major life activities, * * *, (3) is regarded by the covered entity as having *such an impairment*. (emphasis added)

The term "such an impairment" refers to and incorporates the definition of "disability" as set forth in the first of the three parts described in Section 1630.2(g).

At the trial, the Petitioner failed to present any evidence establishing that the Respondents "regarded" or "perceived" Petitioner as having a "disability" as defined under the ADA. The evidence presented on behalf of the Respondents clearly established the contrary, *i.e.*, that Petitioner was not "disabled" or "perceived" or "regarded" by the Respondents as being "disabled".

Respondents refer the Court to its statements relating to Petitioner's misrepresentations set forth in the "Questions Presented" on the issue of the district court's instructions to the jury on "perceived disability" and the issue of whether the

court "focused" on "working" as the major life activity as it related to Petitioner's claim of "perceived disability".

The jury was given the task of resolving the factual issues of whether the Respondents "perceived" or "regarded" Petitioner as having a "disability" as defined under the ADA and the EEOC's regulations. The jury unanimously found for the Respondents. The jury's factual determinations should be deemed as being final. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

CONCLUSION

Based on the foregoing, this case does not merit further review by this Court and the Petition should be denied.

Respectfully submitted,

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